No. 82-2088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
v.
KAY BURNS, *et al.*,
Respondents.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Petitioner,
v.
EUGENE S. GOSS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

BEN H. BECKER
Counsel of Record
SCHWARTZ, STEINBERG, TOBIA, STANZIALE & GORDON, P.A.
141 S. Harrison Street
East Orange, New Jersey 17016
Attorneys for Respondent Goss

RICHARD BEN-VENISTE
PETER D. ISAKOFF
Counsel of Record
BEN-VENISTE & SHERNOFF
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016
202-966-6000

HOCKERT & FLAMM
880 Third Avenue
New York, New York 10022

BRAUNSTEIN, JACOBSON, FREEMAN & VISCOMI
299 Broadway, Suite 720
New York, New York 10007
Attorneys for Respondents Burns, et al.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether section 7(c)(1) of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, requires the dismissal of a pending private action when the Equal Employment Opportunity Commission files a later action on behalf of the same plaintiffs, although the later action does not demand all of the same relief as the earlier. (See Pet. App. 22a, question certified to the Second Circuit by Judge Lasker pursuant to 28 U.S.C. § 1292(b).)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 696 F.2d 21. The opinion of the district court (Pet. App. 8a-16a) is reported at 530 F.Supp. 768.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on December 9, 1982. The court of appeals denied a petition for rehearing with suggestion for rehearing en banc on March 23, 1983 (Pet. App. 25a-26a). The petition for certiorari was docketed on June 21, 1983. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Age Discrimination in Employment Act of 1967, as currently amended, 29 U.S.C. § 626, provides in part:

> (b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211 (b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discrimina-

tory practice or practices alleged, and to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

* * * *

(d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 14(b) applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

Sections 16(b) and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 217, as they read in 1967 when initially incorporated into Section 7(b) of the Age Discrimination in Employment Act,[1] provided as follows:

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[1] The FLSA has since been amended in respects not pertinent to the instant case.

Penalties

Sec. 16. (a) . . .

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

• • • •

Injunction Proceedings

Sec. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section

15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

STATEMENT

In 1978 and 1979, petitioner Equitable Life Assurance Society of the United States (Equitable) terminated over 500 of its employees, of whom approximately 360 were between 40 and 70 years of age. In September 1979, more than 60 days after filing timely charges with the Secretary of Labor[2] and the New York State Division of Human Rights, respondent Kay Burns and five others filed a complaint in the United States District Court for the Southern District of New York charging Equitable with violations of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*[3] One hundred twenty-six other former Equitable employees opted to

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[2] Enforcement of the ADEA was transferred from the Secretary of Labor to the Equal Employment Opportunity Commission. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978). The EEOC and the Secretary of Labor are referred to interchangeably herein.

[3] ADEA § 7(d), 29 U.S.C. § 626(d), and ADEA § 14(b), 29 U.S.C. § 633(b), require that an aggrieved person wait 60 days before commencing a civil action, following the filing of age discrimination charges with the EEOC and a State fair employment practices agency. Unlike Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c), which generally requires that the federal filing postdate the State filing by 60 days, see *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), an aggrieved person may file age discrimination charges with state and federal agencies simultaneously. See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 757 (1979) ("The premise for this difference is that the delay inherent in sequential jurisdiction is particularly prejudicial to the rights of 'older citizens to whom, by definition, relatively few productive years are left.'").

join the *Burns* action pursuant to the procedures set forth in section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b).[4] The *Burns* complaint sought, *inter alia*, reinstatement, back pay, lost fringe benefits, and "liquidated damages" as defined in FLSA § 16(b).[5] In January 1980, respondent Eugene Goss, another employee terminated by Equitable, filed a similar ADEA action against petitioner in the United States District Court for the District of New Jersey. That lawsuit was later transferred to the Southern District of New York and consolidated with the *Burns* action then pending before the Honorable Morris E. Lasker.

In September 1981, nearly two years after Burns and Goss began their actions, the Equal Employment Opportunity Commission (EEOC) filed an action against Equitable alleging the same ADEA violations. The EEOC complaint sought, *inter alia*, reinstatement and back pay on behalf of all employees adversely affected by Equitable's unlawful actions—including the plaintiffs in the *Burns* and *Goss* actions—and liquidated damages on behalf of a large number of terminated Equitable employees but not the *Burns* plaintiffs.[6]

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[4] Section 16(b) of the FLSA is made applicable to ADEA actions by virtue of section 7(b) of the ADEA, 29 U.S.C. § 626(b).

[5] FLSA § 16(b) provides for recovery of unpaid minimum wages or overtime compensation and "an additional equal amount as liquidated damages." Under ADEA § 7(b), such liquidated damages are recoverable under the ADEA only for "willful violations."

[6] Initially, the EEOC complaint listed 19 of the plaintiffs in the *Burns* and *Goss* actions as among the employees for whom liquidated damages were sought. Two days after the filing of the EEOC complaint, however, counsel for the EEOC and the *Burns* plaintiffs entered into a stipulation removing the names of any *Burns* plaintiffs from the EEOC's list. Equitable claimed that the stipulation was not binding, because no attorney for Equitable signed it. Both courts below treated the stipulation as effective, however. In any event, the stipulation is properly construed as a timely amendment of the EEOC complaint as of right under Fed. R. Civ. P. 15(a).

Prior to the filing of the EEOC complaint, respondents expended substantial efforts in trial preparation and in the pretrial activities typical of large civil actions. They had "participated in discovery, motion practice, and several court conferences, as well as expending time in soliciting the participation of the over one hundred opt-in plaintiffs" (Pet. App. 14a). Also, petitioner had filed a motion *in limine* seeking a ruling that if the EEOC commenced an action on behalf of the same plaintiffs, the court would be required to dismiss the pending private actions. After the EEOC filed its complaint, the motion *in limine* was treated as a motion to dismiss.

Petitioner's motion relied on ADEA § 7(c)(1), 29 U.S.C. § 626(c)(1), which provides in part:

> Any person aggrieved may bring a civil action . . . for such legal and equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this Act.[7]

Petitioner claimed that the words "to bring" should be construed to mean "to commence and maintain," and that the proviso therefore requires dismissal of pending actions whenever the EEOC files a complaint on the private plaintiffs' behalf. Respondents argued that the words "to bring" meant simply "to commence," that therefore only the right to start a new action was terminated by the filing of an EEOC civil action, and that pending private actions were not to be affected by a later EEOC filing.

Equitable's motion to dismiss was denied in an opinion by Judge Lasker (Pet. App. 8a-16a). The court acknowledged at the outset, as did all parties, that the proviso clearly prevents individuals from filing private ADEA

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[7] The language of the ADEA as enacted refers to the commencement of an action by the Secretary of Labor. See n.2, *supra*.

actions *after* the EEOC has filed a complaint on their behalf (Pet. App. 10a). It noted that the words "to bring" are otherwise somewhat ambiguous. It concluded, however, that "plaintiffs' interpretation is closer to our understanding of the ordinary meaning of the phrase 'to bring an action'" than Equitable's (Pet. App. 12a).

The court observed that in any event "disposition of this motion need not rest solely on an exegesis of ordinary language usage" (Pet. App. 13a). While the court found no discussion of the point in dispute in the legislative history of the ADEA, that history did specify that enforcement of the ADEA would "essentially follow" that of the FLSA (*id.*). The court noted that the cut-off provision of ADEA § 7(c)(1) is "very similar" to the cut-off provision that was added to section 16(b) of the FLSA in 1961, and that, "fortunately, the FLSA legislative history [relating to the cut-off provision] is more enlightening" (*id.*). The court focused particularly on the following portion of the House-Senate Conference Report to the 1961 amendments to the Fair Labor Standards Act, Conf. Rep. No. 327, 87th Cong., 1st Sess. 20, *reprinted in* [1961] U.S. Code Cong. & Ad. News 1620, 1706, 1714:

> The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's rights to maintain . . . a private suit to which he had become a party plaintiff before the Secretary's action.

The court reasoned that since the ADEA proviso used language nearly identical to the FLSA, and since Congress expressly intended that ADEA enforcement would follow essentially the same procedures contained in the FLSA, the two cut-off provisions should be interpreted the same way (*id.*). Because the legislative history of the FLSA cut-off provision clearly stated that a pending private FLSA action would survive a later government action on the private plaintiff's behalf, the court held that a private ADEA action survives also.

The court's examination of the policy considerations confirmed its analysis of the statutory language and relevant legislative history. As the court stated,

> Private attorneys may very well be discouraged from accepting ADEA cases if the rule is that no matter how much effort they have expended on a suit, so long as it has not be reduced to judgment, the EEOC may cause the case to be dismissed by bringing its own suit. This concern is particularly serious where plaintiffs are unlikely to be able to afford counsel other than on a contingent fee arrangement.
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> * * * *
>
> Moreover, under Equitable's interpretation, the EEOC could wait until several years of litigation have elapsed before filing its own action, resulting in an enormous waste of resources of the plaintiff, his attorney, and the Court. At that point, the plaintiff, who may have invested substantial time and resources in discovery and otherwise in preparation of his case, would lose the benefit of this investment.
>
> * * * *
>
> If Equitable's interpretation were to be accepted, private counsel might be well-advised to wait as long as the statute of limitations permits before filing an ADEA action in order to minimize the likelihood of the EEOC filing an action regarding the same violation. In effect, Equitable is urging an interpretation that would tend to cause claims to be filed when they are not fresh, with all of the problems of faded recollection and lost documentation inherent in stale assertions.

Pet. App. 14a-15a.

On Equitable's motion, the district court certified the question presented on this petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (Pet. App. 21a-22a). The Second Circuit accepted jurisdiction (Pet. App. 17a) and affirmed, using reasoning similar to Judge Lasker's (Pet. App. 1a-7a).

Judge Newman's opinion for the court of appeals[8] relied primarily on the legislative history of the FLSA § 16(b) cut-off provision, quoting the same House-Senate Conference Report language as did the district court (Pet. App. 4a). The court of appeals justified its reliance on FLSA legislative history to interpret the ADEA by citing the rule that in enacting a new law modeled on sections of a prior law, Congress is normally presumed to have had knowledge of judicial and administrative interpretations given to the earlier law. The court continued that

> [t]he presumption is even stronger that Congress was familiar with the reported expressions of its own legislative intent regarding the provisions it has incorporated. Especially is this so where, as here, the incorporating and incorporated statutes are not distant in time, and the selectivity of the incorporation implies a detailed Congressional knowledge of a prior law that was borrowed.

Pet. App. 5a.

The court of appeals also drew on the legislative history of ADEA § 14(a), 29 U.S.C. 633(a), which allocates enforcement authority between plaintiffs suing under state discrimination laws and plaintiffs suing under the ADEA (Pet. App. 5a). That section provides in part that "upon commencement of action under this Act such action shall supersede any State action." As the Second Circuit noted, the House Report to the ADEA states that this language requires that "commencement of an action under this act shall be a stay on State action *previously* commenced" (*id.*; emphasis added by the court of appeals). The court reasoned that

> [t]his wording indicates that the framers of the ADEA well understood how to make clear their in-

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[8] The opinion was joined by Judges Mansfield and Van Graafeiland.

> tentions to depart from FLSA procedures by permitting a category of pending lawsuits to be preempted. The absence of such an intention with respect to private ADEA suits pending prior to the filing of suit by the EEOC indicates that Equitable's reading of the statute is unwarranted.

Pet. App. 5a-6a.

Finally, the court of appeals agreed with Judge Lasker that permitting an EEOC complaint to oust pending actions would have "unfortunate" consequences:

> First, private counsel would be motivated to avoid the cases most urgently requiring remedial action, for such cases would be most likely to invite preemptive public litigation. Second, private counsel willing to initiate ADEA suits would be motivated to delay as long as possible the filing of complaints to increase their opportunity to learn whether EEOC litigation will preempt their efforts. . . . This latter result would impede the achievement of a central goal of the ADEA's framers, who were concerned that delay would prejudice the claims of older plaintiffs, and who consequently sought to achieve expeditious enforcement.

Pet. App. 6a.

The court of appeals therefore affirmed the order of the district court denying petitioner's motion to dismiss the *Burns* and *Goss* complaints.

ARGUMENT

THE DECISION OF THE SECOND CIRCUIT IS NOT IN CONFLICT WITH THAT OF ANY OTHER COURT OF APPEALS, IS CORRECT, AND DOES NOT WARRANT THIS COURT'S REVIEW.

I. There Is No Conflict In The Circuits.

Several district courts have decided the question presented in the instant petition with mixed results. This is the only case, however, in which this issue has been presented to and decided by a court of appeals. So far as we are aware, in only four cases beside this one has the EEOC brought an ADEA action on behalf of aggrieved individuals who had already started their own private civil action. In *Sheppard* v. *National Broadcasting Co., Inc.*, 24 F.E.P. Cases 945 (S.D. N.Y. 1980), and *Mistretta* v. *Sandia Corp.*, 12 F.E.P. Cases 1225 (D N.M. 1975), 15 F.E.P. Cases 1690 (D. N.M. 1977), aff'd in part and rev'd in part on other grounds, 639 F.2d 588 (10th Cir. 1980), 649 F.2d 1383 (10th Cir. 1981), the pending private civil actions survived the government filing.[9] In the other two cases, *Castle* v. *Sangamo Weston, Inc.*, 31 F.E.P. Cases 324 (N.D. Fla. 1983), and *Jones* v. *City of Janesville*, 488 F.Supp. 795 (W.D. Wis. 1980) (private action commenced two days before EEOC ac-

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[9] In *Sheppard*, then District Judge Pierce denied a motion to dismiss, expressly rejecting the position now asserted by Equitable.

In *Mistretta*, Equitable's position was impliedly rejected when the district court stated that no more plaintiffs could enter the private action once the Secretary of Labor filed its own action. Nothing was said about dismissing the pending private actions on behalf of those plaintiffs who had already opted in, 12 F.E.P. Cases at 1228, 15 F.E.P. Cases at 1693, and in fact those actions continued. See the opinion of the Tenth Circuit on appeal in one of the private actions noting that the settlement in the later-filed EEOC action included relief for a number of the plaintiffs in the private civil action. 649 F.2d at 1391.

tion), the district courts dismissed the private civil actions.[10]

In neither *Sheppard* nor *Jones* v. *City of Janesville* was there an appeal by the losing party on this issue.[11] In *Mistretta*, although the court of appeals was aware of the procedural posture of the private and public ADEA actions, it did not directly comment on the issue presented here. See n.9, *supra*. In *Castle* v. *Sangamo Western, Inc.*, the plaintiff has appealed to the Eleventh Circuit from the dismissal of the complaint, and the case is now awaiting argument and decision by that court. Thus, the instant case is the only one in which this issue has been decided by a court of appeals. There is therefore no conflict among the circuits.

Petitioner nonetheless attempts to create an appearance of circuit court conflict by citing language in a variety of ADEA decisions (see Petn. at 13-16). To be sure, in two of the court of appeals decisions, *Vance* v. *Whirlpool Corp.*, 707 F.2d 483, 488 (4th Cir. 1983), and *Reich* v. *Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir.), cert. denied, 439 U.S. 1006 (1978), there is dicta to support petitioner's position. But in neither case was the issue remotely related to that involved here. No EEOC suit had been filed. In *Vance*, the question was whether the 60-day waiting period of ADEA § 7(d), 29 U.S.C. § 626(d), is a jurisdictional prerequisite to the bringing of a private ADEA action. 707 F.2d at 486. And in *Reich*, the issue was whether the plaintiff had complied with various ADEA time limitations and notice provisions. 575 F.2d at 366-367. The language in *Vance* and *Reich* relied upon by petitioner was neither necessary to either decision nor

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[10] In *Castle* and *Jones*, there was no discussion of the pertinent FLSA history relied upon by the lower courts in this case.

[11] There was an appeal in the EEOC action against the City of Janesville, in which this issue was not presented. See *EEOC* v. *City of Janesville*, 630 F.2d 1254 (7th Cir. 1980).

a substantial factor in the opinion's analysis. Rather, the language cited amounts to little more than a somewhat casual and inaccurate paraphrasing of ADEA § 7(c)(1) in the course of generally describing the statutory scheme. There was no analysis of the section 7(c)(1) language, its legislative history or pertinent policy considerations. In the instant case, the Second Circuit simply ignored the contrary dicta in *Reich*.[12]

Petitioner also cites *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036, 1038-1039 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978); and *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 841 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978), in support of its contention that there is a conflict in the Circuits that this Court must resolve. Each of those cases presented the question whether damages for pain and suffering or punitive damages are available under the ADEA. But none of the three opinions even contains language bearing on the issue presented in this case. Rather, each contains the broad statement that pri-

[12] Like *Reich* and *Vance*, the district court decisions cited by petitioner at 16 n.17 contain dicta somewhat favorable to petitioner, but again unaccompanied by any discussion or analysis, and involved questions wholly unrelated to the instant case. See *Pieckelun* v. *Kimberly-Clark Corp.*, 493 F.Supp. 93, 97 (E.D. Pa. 1980) (presenting question whether plaintiff had given adequate notice to the EEOC within the statutory 300-day period; no government lawsuit involved); *Marshall* v. *American Motors Corp.*, 475 F.Supp. 875, 882 (E.D. Mich. 1979) (whether the EEOC was required to defer to state authorities for sixty days under ADEA § 14(b), 29 U.S.C. § 633(b), before commencing its own action; no private lawsuit involved); *Lundgren* v. *Continental Industries, Inc.*, 14 F.E.P. Cases 58, 61 (N.D. Okla. 1976) (whether Secretary's failure to carry out his conciliation obligations under the ADEA was a jurisdictional bar to aggrieved person's private civil action; no government lawsuit involved); *Bishop* v. *Jelleff Associates*, 398 F.Supp. 579, 592 (D. D.C. 1974) (whether notice requirement of ADEA § 7(d), 29 U.S.C. § 626(d), is jurisdictional prerequisite to filing of a private civil action; no government lawsuit involved).

vate lawsuits are secondary to administrative remedies and suits by the EEOC. The Second Circuit's decision does not conflict with that generalization.[13]

Under ADEA § 7(d), 29 U.S.C. § 626(d), an aggrieved person must file a charge with the EEOC sixty days prior to bringing a private lawsuit. And by virtue of ADEA § 7(c)(1), if the EEOC begins a lawsuit before the aggrieved person does, his right to do so is extinguished. Thus, to a limited extent, private enforcement is subject to government preemption and therefore may be said to be secondary to EEOC enforcement under the statutory scheme. The Second Circuit did not disagree. The decision simply stated that if an aggrieved person begins a lawsuit after giving the EEOC the statutory notice and waiting the requisite 60-day period to see if the EEOC has adequately settled the matter or instituted its own action on his behalf, he has the right to continue and to control his own action, represented by his own counsel, whether or not the EEOC thereafter files suit.[14]

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[13] As Judge Lasker stated, "while the cases discussed by Equitable, cited above, do indicate that, in certain circumstances, private actions are secondary to EEOC actions, there is no indication either in the legislative history or the case law pertinent to the ADEA that the subordination was intended to be so great as to undermine the viability of an existing private action." Pet. App. 15a.

[14] The right to continue a pending private action is not insubstantial. If respondents' private actions were to be dismissed, they would be represented by a government agency which, although nominally acting on respondents' behalf, would not be accountable directly to them. Cf. *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044, 1048 (2d Cir. 1982) (age discrimination claimants, dissatisfied with EEOC settlement about which they were never contacted, moved to amend stipulation of dismissal); *EEOC* v. *Consolidated Edison Co. of New York*, 557 F.Supp. 468 (S.D. N.Y. 1983) (age discrimination claimants dissatisfied with settlement unsuccessfully moved to "opt out" of the settlement). Furthermore, in view of the EEOC's limited litigation resources, see p. 23 and Appendix, *infra*, respondents can reasonably expect more aggressive representation from counsel of their choice than from a government

In short, no court of appeals has held, contrary to the Second Circuit, that a private ADEA action must be dismissed if the EEOC later files an action on the plaintiff's behalf.[15]

II. The Second Circuit's Decision Was Correct And There Are No Extraordinary Circumstances Warranting This Court's Review.

A. *The Words of the Statute.*

The statutory question decided by the Second Circuit was whether the words "to bring" as used in ADEA § 7(c)(1) mean to commence an action or to commence and maintain an action. As this Court stated in *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978), quoting *Standard Oil* v. *United States*, 221 U.S. 1, 59 (1911), "'where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.'" The words "to bring an action" did have a well-known meaning at

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action that could be sidetracked or delayed for a variety of reasons unrelated to their concerns. Lastly, not all of the relief prayed for in respondents' private actions is even being sought by the EEOC. See p. 6 n. 6, *supra*.

[15] Nor, contrary to the suggestion in the Petition at 14 n.15, is there any conflict between the Second Circuit's decision and this Court's in *Lorillard* v. *Pons*, 434 U.S. 575 (1978). In the course of its opinion, this Court paraphrased ADEA § 7 as follows:

> After allowing the Secretary 60 days to conciliate the alleged unlawful practice, the individual may file suit. The right of the individual to sue on his own terminates, however, if the Secretary commences an action on his behalf. § 7(c), 29 U.S.C. § 626(c).

434 U.S. at 580. It is apparent that the words "to sue" in the second quoted sentence refer back to the words "file suit." Thus, to the extent that the passage in *Lorillard* has any bearing on the question presented here, it is in accord with the Second Circuit's decision.

common law when incorporated into the ADEA in 1967 and when added to the FLSA in 1961. See the definition of "bring suit" in *Black's Law Dictionary* (4th ed. 1968) at 240:

> To "bring" an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. [Citation omitted.] A suit is "brought" at the time it is commenced. [Citations omitted.] "Brought" and "commenced" in statutes of limitations are commonly deemed to have been used interchangeably. [Citation omitted.]

See also *Goldenberg* v. *Murphy*, 108 U.S. 162, 163 (1883):

> A suit is brought when in law it is commenced, and we see no significance in the fact that in the legislation of congress on the subject of limitations the word "commenced" is sometimes used, and at other times the word "brought." In this connection the two words evidently mean the same thing, and are used interchangeably.

There is nothing in the context of the ADEA that "compels" the conclusion that Congress used the words "to bring" in any other than their well-known meaning. Petitioner suggests in a footnote (see Petn. 15 n.15) that the use of the word "commence" in the proviso to section 7(c)(1) suggests that the word "bring" must have a "broader meaning." But since "bring" and "commence" are commonly used interchangeably,[16] there is no reason to believe that Congress intended to alter the usual meaning of the words "to bring" in such an indirect manner.

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[16] Equitable's chief trial lawyer has recognized that the words "bring" and "commence" are used interchangeably in this context. See 1 Walter B. Connolly, Jr. and Michael J. Connolly, A Practical Guide to Equal Employment Opportunity (1979) at 223-224: "Section 7(c) of the [ADEA] also provides that an individual's right to bring an action terminates when the Secretary brings an action to enforce the rights accorded such an individual by the ADEA."

Thus only the right to begin a new action is "terminated" by the filing of an EEOC age-discrimination action.

B. *Legislative Intent.*

In any event, as the district court and court of appeals correctly ruled, the legislative intent is clearly consistent with respondents' reading of the ADEA cut-off proviso. Congress explicitly stated at numerous points throughout the legislative history that enforcement procedures of the ADEA would "essentially follow" those of the FLSA.[17] The ADEA cut-off provision was plainly modeled on the cut-off provision in FLSA § 16(b). The operative language of the two provisions is virtually identical,[18] and nothing suggests that the same language was intended to be given different meanings.

Indeed, to give the provisions different meanings would create an anomalous internal inconsistency in the ADEA, since ADEA § 7(b) expressly incorporates the FLSA § 16(b) cut-off provision by reference. In other words, both cut-off provisions are part of ADEA enforcement procedure. It would make no sense to attribute to Congress an intent to enact oddly inconsistent procedural provisions without some clear and direct evidence of such an intent. Needless to say, there is none. Thus, even though there is nothing in the 1967 legislative history of the ADEA that directly explains the meaning of the words "to bring" in ADEA § 7(c)(1), there is every reason to

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[17] See, *e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, 2218; S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967).

[18] The operative language of the ADEA § 7(c)(1) cut-off provision is "the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary . . . ." The operative language of the FLSA § 16(b) cut-off provision is "[t]he right provided by this subsection to bring an action . . . shall terminate upon the filing of a complaint by the Secretary of Labor . . . ."

believe that Congress intended the procedural effect to be the same as under FLSA 16(b).[19]

The cut-off provision in FLSA § 16(b) was added to that statute in 1961. Pub.L. 87-30, 75 Stat. 65. The House-Senate Conference Report to the FLSA amendment, describing the new cut-off provision, focused directly on its procedural effect:

> The bringing of an action by the Secretary seeking such relief with respect to such compensation owing to any employee would, after filing of the complaint in the Secretary's action, preclude such employee from becoming a party plaintiff in a private action to recover the amounts due and an additional equal amount as liquidated damages. The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff before the Secretary's action.

Conf. Rep. No. 327, 87th Cong., 1st Sess. 20, *reprinted in* [1961] U.S. Code Cong. & Ad. News 1620, 1706, 1714. There is no doubt about what Congress intended. See S. Rep. No. 145, 87th Cong., 1st Sess. 39, *reprinted in* [1961] U.S. Code Cong. & Ad. News 1620, 1658-1659 (emphasis added):

> Under these amendments, however, filing of a complaint by the Secretary, pursuant to the new authority given him to initiate such injunction suits without formal requests from employees, terminates the rights of individuals to *later* file suit for compensation and liquidated damages under 16(b).

Procedure under FLSA § 16(b) is clear. If the Secretary files first, the right of the employee to do so is ex-

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[19] See generally *Lorillard* v. *Pons*, *supra*, 434 U.S. at 582: "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."

tinguished.[20] If the employee files first, both his action and the Secretary's go forward.[21] Accordingly, if the ADEA § 7(c)(1) cut-off provision operates the same way as the FLSA § 16(b) cut-off provision does, the courts below were clearly correct in denying petitioner's motion to dismiss.

Recognizing that to be the case, petitioner attacks the Second Circuit (Petn. at 9-10 n.9) for relying on FLSA legislative history in interpreting the ADEA, claiming that "the lower court's novel approach to statutory construction . . . is itself sufficiently significant to warrant this Court's review." But there is nothing either novel or erroneous about the Second Circuit's reliance on the FLSA legislative history.

As this Court noted in *Lorillard* v. *Pons*, *supra*, and *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979), the ADEA was patterned largely on pre-existing statutes, *i.e.*, the FLSA for its enforcement provisions, and Title VII of the Civil Rights Act of 1964 for its definition of

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[20] It was not every suit filed by the Secretary under the version of the FLSA in effect in 1967 that would terminate an individual's section 16(b) action, but only injunction suits under section 17 in which unpaid minimum wages or overtime compensation are sought as part of the relief. Section 17 injunction actions in which such monetary recovery was not sought would not terminate an employee's right to bring his own section 16(b) action.

[21] Petitioner cites *Wirtz* v. *Robert E. Bob Adair, Inc.*, 224 F.Supp. 750, 755 (W.D. Ark. 1963), to support its argument that FLSA procedure was not clear when Congress enacted the ADEA. See Petn. at 10 n.3. But that case did not present the question for which it is cited. There was no private action pending. And the dicta to which petitioner refers does not even speak of terminating pending actions, but only of terminating the right "to recover" liquidated damages. This ambiguous comment, unaccompanied by analysis of the language or legislative history, obviously had no impact on Congress' intent in enacting ADEA § 7. Moreover, no citation to the *Wirtz* case appears anywhere in the 1967 legislative history of the ADEA. *Cf. Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 823; see also *id.* at 831 (Blackmun, J., dissenting).

prohibited discrimination and the relationship between federal and state agency enforcement. In *Oscar Mayer & Co.*, the Court was presented the question whether an aggrieved person was required to resort to appropriate state remedies before bringing suit under ADEA § 7(c). In answering that question affirmatively, the Court relied heavily on the legislative history of Title VII of the Civil Rights Act of 1964. The Court noted that ADEA § 14(b), 29 U.S.C. § 633(b), "was patterned after and is virtually *in haec verba* with § 706(c) of Title VII of the Civil Rights Act of 1964." 441 U.S. at 755. It quoted extensively from remarks of congressmen in the 1964 civil rights debates in discerning Congress' intent in enacting ADEA § 14(b) in 1967. *Id.* at 755, 757-758, 761-762 n.8, 763.[22] The Second Circuit's reliance on the legislative history of the FLSA from which ADEA enforcement procedures were drawn was thus in accord with precedent and a matter of good common sense.

Petitioner nevertheless suggests (Petn. at 10 n.9), that reliance on the legislative history of the FLSA cut-off provision is unsound because Congress did not incorporate that provision by reference, "but instead enacted a separate, somewhat different provision, as part of the ADEA itself." First of all, petitioner is incorrect in stating that the ADEA does not incorporate FLSA § 16(b)'s cut-off provision. See ADEA § 7(b), 29 U.S.C. § 626(b), and discussion at p. 18, *supra*. Further, petitioner fails to acknowledge that Congress used identical language in both provisions in conferring a right "to bring" an action which right would "terminate" upon the commence-

[22] See also *Lehman* v. *Nakshian*, 453 U.S. 156 (1981). In 1974, Congress amended the ADEA to allow suits against federal government employers. See ADEA § 15, 29 U.S.C. § 633a. In *Lehman*, the Court was presented the question whether there was a right to a jury trial in such a lawsuit. In deciding that there was no such right, the Court relied in part on legislative history of 1972 amendments to Title VII. 453 U.S. at 167 n.16.

ment of an action by the Secretary of Labor. See n.18, *supra*. If Congress had intended that the same words should mean different things in the ADEA and the FLSA, it certainly could have said so. In any event, there is no basis for attributing a difference in Congress' intent in situations where it repeats the words of a prior statute as compared with instances where it incorporates those same words by reference.[23]

The courts below were thus amply justified in relying on FLSA history in construing the ADEA, and that legislative history unequivocally supports respondents' reading of ADEA § 7(c)(1).

C. *Policy Considerations.*

Lastly, petitioner complains (Petn. at 17-19) that the decisions below have created uncertainty over the EEOC's authority to enforce the ADEA, and that the lower courts failed to appreciate its policy arguments. There is no such uncertainty, however, and petitioner's policy arguments are unpersuasive.

First, the EEOC's authority to enforce the ADEA is expressly spelled out in the statute itself. Moreover, the inadequacy of petitioner's claim that the Second Circuit's

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[23] For example, the House version of ADEA § 7(e)(1), H.R. 13054, 90th Cong., 1st Sess., spelled out a statute of limitations for ADEA actions of two years, except for willful violations, in which case the limitations period was to be three years. Those periods are the same as those which were applicable to FLSA actions in 1967 by virtue of section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255. The Senate version of ADEA § 7(e)(1), S. 830, 90th Cong., 1st Sess., provided for the same limitations periods, but simply incorporated section 6 of the Portal-to-Portal Act by reference. Since the accompanying House and Senate Reports, H.R. Rep. No. 805, 90th Cong., 1st Sess. 6, *reprinted in* [1967] U.S. Code Cong. & Ad. News 2213, 2218; S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967), describe the respective versions of the ADEA statute of limitations in identical terms, it is clear that no significance should be ascribed to Congress' decision to restate prior statutory language rather than to incorporate it by reference.

decision "will hinder EEOC's ability to conciliate or litigate effectively" is underscored by the fact that the EEOC itself has consistently supported respondents on the question presented by this petition in *amicus* filings in the lower courts. (A brief portion of the EEOC's *amicus* brief in the Second Circuit is reprinted as an Appendix to this Opposition with the EEOC's permission.) In the Second Circuit, the EEOC vigorously defended the correctness of Judge Lasker's decision denying petitioner's motion to dismiss. The EEOC agreed that dismissing the instant private actions would have a chilling effect on the private bar's willingness to undertake ADEA actions, and that "[a]ny chill . . . on private rights of action, will severely hamper enforcement of this important ban on age discrimination in employment." See Appendix to this Opposition. As the EEOC explained in detail to the Second Circuit, the EEOC does not have the budget or staff capability to enforce the ADEA on its own.

Petitioner claims that the Second Circuit ignored the difficulties that would arise if counsel for private claimants and the EEOC asserted the same rights against an employer. The result is said to be intolerably duplicative. But the possibility of duplicative actions exists in many settings in which more than one person is hurt by a particular defendant's actions. The courts have ample power to overcome most difficulties through changes of venue, consolidation, appropriate discovery orders and the like. See *Crown, Cork & Seal Co.* v. *Parker*, No. 82-118 (June 13, 1983), slip op. at 8. There is nothing inherently difficult about coordinating EEOC and private civil actions under the ADEA. See, *e.g.*, *Mistretta* v. *Sandia Corp.*, discussed at p. 12 & n.9, *supra*.

In any event, as the district court stated, petitioner's claims of intolerable duplication are exaggerated:

> As for Equitable's concerns in regard to multiplicity of litigation, it does not appear that our dis-

> position adds in any but the most marginal way to its volume. The statute allows each aggrieved person to retain his own counsel and sue individually. Moreover, in those cases in which the EEOC chooses to file an action, there is nothing in the statute precluding the EEOC from filing on behalf of only those persons who have not filed private actions.

Pet. App. 16a.

It is clear that the debilitating effect on private ADEA enforcement would be substantial if the Court were to grant certiorari and hold that pending private actions must be dismissed if the EEOC later files a complaint on the plaintiffs' behalf.[24] As Congress recognized in enacting the ADEA, an individual who is forced out of a job between the ages of 40 and 70 faces severe financial hardships and handicaps in the work marketplace.[25] The individuals on whose behalf Congress enacted the ADEA are thus often in difficult financial straits. In many cases, therefore, one must realize that counsel can be retained only on a contingent fee basis. If private actions are subject to later termination at any time within the statute of limitations period by the filing of an EEOC action, private counsel would likely either avoid ADEA claims entirely or delay filing them until the last minute when it would presumably be clear that the EEOC would be filing no action of its own. Since the statute of limitations for ADEA actions is either two or three years (depending upon whether the violation was willful), with an additional potential one-year tolling period, see ADEA

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[24] In addition, termination of a pending lawsuit would be unfair to the age discrimination victim because there would be no available mechanism to recover the prior litigation costs. By contrast, if the private litigation is brought to a successful conclusion, the plaintiff is entitled to costs and attorney's fees. See FLSA § 16(b), 29 U.S.C. § 216(b).

[25] See, *e.g.*, ADEA § 2(a)(1), 29 U.S.C. § 621(a)(1); 113 Cong. Rec. 34749 (Dec. 4, 1967) (remarks of Rep. Donohue); *id.* at 34751 (Dec. 4, 1967) (remarks of Rep. Dwyer).

§ 7(e)(2), 29 U.S.C. § 626(e)(2), the delay in vindicating rights under the ADEA could be substantial. Congress made clear, however, that, by definition, time was running out for age discrimination victims and that delay in enforcement was to be avoided.[26]

In any event, these policy judgments are for Congress to make, not the courts. At most, such policy considerations are aids in interpretation only. Where Congress has made clear its intentions, the courts are bound to respect the procedural scheme enacted by Congress. *Mohasco Corp.* v. *Silver*, *supra*, 447 U.S. at 825-826. It is clear that Congress recognized in amending the FLSA in 1961 that there could be tandem FLSA proceedings if the Secretary of Labor filed suit after the employee did. That was the plan it chose. There is every reason to believe that Congress enacted the same plan in passing the ADEA.[27]

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[26] See generally *Oscar Mayer & Co.* v. *Evans*, *supra*, 441 U.S. at 757 (noting that ADEA procedures were expressly designed "to expedite the processing of age-discrimination claims"). See n.3, *supra*.

[27] Certainly, in the absence of a conflict in the Circuits, nothing in the petition suggests the existence of a problem significant enough to warrant this Court's intervention even if the Second Circuit were wrong in its construction of the ADEA. The adverse consequences of potentially duplicative litigation are minimal. The EEOC has sought relief on behalf of persons who had already filed private ADEA actions in only a handful of cases. See pp. 12-13, *supra*. And in the lower courts, the EEOC expressly agreed with respondents' reading of the Act and disavowed any notion that it caused the EEOC any problems in enforcing the ADEA.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BEN H. BECKER
Counsel of Record
SCHWARTZ, STEINBERG, TOBIA,
STANZIALE & GORDON, P.A.
141 S. Harrison Street
East Orange, New Jersey 17016
Attorneys for Respondent
Goss

RICHARD BEN-VENISTE
PETER D. ISAKOFF
Counsel of Record
BEN-VENISTE & SHERNOFF
4801 Massachusetts Ave., N.W.
Washington, D.C. 20016
202-966-6000

HOCKERT & FLAMM
880 Third Avenue
New York, New York 10022

BRAUNSTEIN, JACOBSON,
FREEMAN & VISCOMI
299 Broadway, Suite 720
New York, New York 10007
Attorneys for Respondents
Burns, et al.

APPENDIX

The following paragraph appears at pp. 19-20 of the *amicus curiae* brief of the equal Employment Opportunity Commission, filed in the United States Court of Appeals for the Second Circuit in this case in support of respondents' position (footnote omitted):

> The enforcement of the ADEA, as of [*sic*] Title VII, must depend in large part on private enforcement. The EEOC has neither the budget nor the staff capability to bring suit on all valid ADEA charges. Thus, for example, in fiscal year 1981, the EEOC received 9,550 charges alleging age discrimination. *EEOC 16th Annual Report* (1982) at 7-8 ("Ann. Rpt."). Of these, 1,787 were settled or conciliated and closed. Ann. Rpt. at 5-6. Of the remainder, 879 were either unsuccessfully conciliated or the EEOC was without jurisdiction to consider them, and another 527 were closed administratively. (*Id.*) This means that at least 6,357 persons were left with viable ADEA claims. During the same fiscal year, the EEOC brought 89 ADEA actions, a record number. Ann. Rpt. at 28. Even assuming that only ten percent of the remaining claims were meritorious, that would leave 636 meritorious suits that could be filed, of which the Commission was able to institute only 89. Clearly, then, the vast majority of ADEA enforcement actions cannot be brought by the EEOC. Any chill, therefore, on private rights of action, will severely hamper enforcement of this important ban on age discrimination in employment.

We reprint this portion of the EEOC's brief by permission.